BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF E. J. RODY and SONS, Inc., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 84-294 FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a decision disapproving a proposed force main extension for its failure to conform to an approved general sewer plan, came on for formal hearing before the Pollution Control Hearings Board; Lawrence J. Faulk, Wick Dufford, and Gayle Rothrock (presiding) on February 7, 1985. The proceedings were officially reported by Nancy Miller of R. H. Lewis and Associates in Tacoma.

William Lynn, attorney at law, represented the Rody Corporation; Charles W. Lean, Assistant Attorney General represented the Washington State Department of Ecology.

Witnesses were sworn and testified. Exhibits were offered, admitted and examined. Oral argument was heard. Dan Haire moved to intervene in this appeal under Civil Rule 24(a) and Pierce County, a joined party co-appellant, moved for a granting of summary judgment. Both motions were denied. The regular evidentiary hearing followed thereafter.

From the testimony, evidence and contentions of the parties at hearing the Board makes these

FINDINGS OF FACT

I

Appellants Rody own 130 acres of property in a relatively undeveloped area east and south of Tacoma by Canyon Road, near Summit and south of Puyallup.

They wish to develop their property and provide for sewage disposal, accordingly. The soils there vary. Tests have shown most areas percolate but some 20 percent of the property does not. Generally, there are soft soils down three feet, at which time "hardpan" is encountered. The Rodys prefer to develop a sewer system instead of individual septic tanks on that part of the acreage slated for development.

II

Appellant wishes to build a 220- to 240-unit mobile home park on 59 acres of the Rody family property, a density of between four and five units per acre. There are no stated plans for development of the easterly 80 acres.

The Rodys were advised that under Department of Social and Health Services sanitation regulations, 3.5 residential units per acre would be the limit with septic tanks. Appellant elected not to apply to Pierce County for septic tank installation approval for any of the family property to be developed.

III

In early 1982 appellants applied to Pierce County for permission to design and construct a "temporary" force main extending westerly from the Rody property approximately three miles. A pumping system would be installed to lift the sewage to its point of connection at 84th Street to the north-south oriented Midland Trunk line, a part of the City of Tacoma sewerage system. Appellants expressed interest in placing first a four-inch force main until such time as their development density approaches five (5) units per acre. Then an eight-inch force main would replace the four-inch line. The eight-inch line would have the capacity to serve five units per acre over the entire 130-acre Rody tract. Other parties could hook-up to the force main by paying a latecomer's fee. The County approved the proposal, executing a Preliminary Developers Extension Agreement, setting forth conditions of approval.

IV

The City of Tacoma gave assurances to Pierce County that they have sufficient capacity at this time in their sewage treatment system to receive the wastewaters from the vicinity of the Rody property.

V

The subject area is not yet reached by trunk lines for sewer service under the applicable general sewer plan--the Puyallup River Basin Water Quality Management Plan (Plan). This Plan, developed by the County, was approved by DOE in 1974. As future growth comes to pass, the Plan calls for trunk sewer lines to be built out along slope and drainage lines which match the topography of this part of the Puyallup Basin. The Plan incorporates a schematic drawing which sets forth the preferred placement of proposed future sewer trunk lines along generally north-south lines, taking advantage of the force of gravity.[1] The Rody force main would run east-west, perpendicular to the planned trunk lines, and against the drainage topography.

VI

Pierce County Utilities Department encourages sewers for new developments in the county whenever feasible and practical. One advantage of the Rody proposal, from the County's perspective, is the attendant conversion of at least one existing development (Canyon Heights Trailer Park) in the Canyon Road area to sanitary sewers. Septic system problems once experienced at this latter site have, however, been solved.

County officials handling the Rody request viewed the east-west cross direction of the proposed force main and its substantial length

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1. Pierce County does not at this time have a comprehensive plan and zoning ordinance. The Plan here is the principal planning document available for guidance on present and future use of water and land resources and maintenance of water quality.

as merely technical matters of implementation which are not genuinely contrary to the Plan, which plan they regard as conceptual or "first generation" in nature.

VII

The force main project, as originally contemplated, called for an interbasin transfer of sewage. This idea was abandoned because it was understood to require amendment of the affected general sewer plans. Neither the appellant nor the County initiated Plan amendment procedures for the revised wholly intrabasin project.

VIII

Predictions of growth and of attendant sewer development suggest that it may be twenty years or more before a trunk line following the route illustrated in the Plan will reach appellants' property. The appellant expressed a willingness to hook up to such a line when it is available and not to oppose local improvement district formation to finance it. However, given the time frame anticipated, the term "temporary" cannot properly be applied to the proposed topography-defying force main. Moreover, the very existence of the force main may to some degree influence growth patterns in a manner which would further retard the arrival of gravity trunk lines for the area.

IX

In May of 1983 Ken Rody submitted an engineering report for the proposed force main and connecting sewer lines to the State Department of Ecology (DOE) which evaluates such plans under terms of the State

Water Pollution Control Act and implementing regulations entitled "Submission of Plans and Reports for Construction of Wastewater Facilities." A DOE district engineer reviewed the Rody engineering report and consulted with county officials and the applicant about the open-ended time frames for the force main, a factor which points to a more permanent look to the project. Problems of serving a small developing area at great distance from the rest of the area sewage system were noted, as were probable high operating and maintenance costs, and a lack of firm effective plans to serve potential users near the route of the proposed new force main.

DOE preliminarily determined the proposal was not truly a temporary installation and was not configured and aligned in compliance with the Plan. An exchange of views and letters amongst the parties occurred for several months thereafter. A formal letter disapproving the engineering report was sent to the Rody's on September 28, 1984, stating the proposal does not conform to the general sewer plan.

From this letter decision of DOE, appellant E. J. Rody and Sons, Inc., appealed on October 22, 1984, asking that DOE's decision be found in error.

X

Viewing the entire record, the Board finds that appellant's proposed force main sewer project fails to adhere to the applicable general sewer plan. It contemplates a large capacity, long distance line, to continue in use indefinitely, leapfrogging the planned

future gravity trunk lines in order to connect up to the nearest such line presently in existence. If such a radical departure were found to be within the plan, it is difficult to conceive of any proposal which would be inconsistent with it. Subsequent proposals of this sort would have to be approved. The Plan would be meaningless.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 90.48 RCW.

II

This appeal raises the legal question of whether the DOE has authority to disapprove an engineering report for proposed sewer service facilities on the grounds of nonconformance with the applicable general sewer plan.

III

The State Water Pollution Control Act provides for a comprehensive state program "to prevent and control the pollution of the waters of the state." RCW 90.48.010. This comprehensive program includes planning functions as well as the means to regulate individual discharges.

RCW 90.48.110 calls for DOE approval or disapproval of plans and

specifications for sewerage systems and extension thereto on the basis of their adequacy "to protect the quality of the state's waters as provided for in this chapter."

Requiring conformance of individual projects to overall sewer plans for an area is consistent with the broad protective mandate which the chapter as a whole sets forth.

IV

DOE has adopted regulations which require that sewer projects conform with general sewer planning. WAC 173-240-040 states that engineering reports, plans and specifications must meet the policies and requirements of chapter 90.48 RCW. WAC 173-240-050 establishes requirements for general sewer plans and WAC 173-240-060 sets forth the requirements for engineering reports which implement portions of the general plan. The clear intent is that the more specific engineering reports shall be consistent with the generalized areawide planning. The DOE publication "Criteria for Sewage Works Design" reinforces this interpretation, stating:

> The [engineering] report shall identify and be consistent with all applicable areawide project, drainage basin, service area, comprehensive and metropolitan area plans.
>
> Section 1.22 (p.5)

V

DOE's regulations, implementing RCW 980.48.110, are, as applied, reasonably consistent with that statute. Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976). Moreover, the regulations are also consistent with the broader statutory scheme,

which includes chapter 36.94 RCW, an enactment addressing sewer planning by counties. General sewer plans are required of counties. RCW 36.94.030. Such plans must be approved by DOE. RCW 36.94.100. After adoption, counties are obliged to "abide by and adhere to the plan for the future development of their systems." RCW 36.94.110. DOE oversight through RCW 90.48.110 provides a means for enforcing the County's obligation.

VI

Appellant and Pierce County claim Rody's sewer service proposal is the only sewer proposal which is feasible at this time for Rody's mobile home development and other developments in the Summit area. Septic tank sanitation systems or other modern on-site sewage systems may well serve any proposed mobile home complex of a lower density which appellants may elect to develop at this time or in the very near future. Alternatively, appellants may request a formal plan amendment and ascertain, after hearings to obtain the views of the public, whether an alteration in the general blueprint for sewers in the area is approvable through the planning process. Finally, appellant may elect to postpone a mobile home park development until other developers have approved plans for the area, whose sponsors will participate in a ULID for a north-south trunk line.

VII

Accordingly, we conclude that, as a matter of law, DOE may disapprove an engineering report for proposed sewer facilities on the grounds of nonconformance with the applicable general sewer plan.

Since we have found that the project at issue fails to adhere to the applicable plan, we conclude that DOE's disapproval in this instance was proper.

VIII

Any Finding of Fact which is deemed a Conclusions of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The decision of the Department of Ecology of September 28, 1984, disapproving the engineering report for the Pierce County 84th Street Force Main Sewer Extension is affirmed.

DONE this 6th day of May, 1985.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Vice Chairman

Wick Dufford
WICK DUFFORD, Lawyer Member

(See Dissent)
LAWRENCE J. FAULK, Chairman

LAWRENCE J. FAULK - DISSENT

I write separately because I believe the result reached by the majority is unreasonable, unjust to this property owner, and certainly not required by the law.

I

THE PROPOSED SYSTEM IS CONSISTENT WITH THE GENERAL PIERCE COUNTY SEWER PLAN

The DOE took the position that the Rody system was "completely counter" to the general plan, but it was unclear why they took this stand. It was not because the line runs east-west. Mr. Tom Eaton from the DOE testified that east-west lines are not inconsistent with the plan per se. It is not because the system includes force mains. Mr. Eaton also stated that force mains can be used. It is because in his opinion the system will inhibit the development of the north-south trunk lines shown on the plan. I disagree. I think it will encourage north-south trunk lines. The system is temporary and can and will be connected at any time to north-south running mains when they are built in proximity to the Rody development.

The general plan itself indicates that it was never intended to detail specific requirements. The plan shows only "trunk" lines nearly all of which are ten inches or larger in diameter. Rody's line is eight inches in diameter. In its summary the plan stated that it is a "first generation plan" and that "additional technical studies [would be] required." General Plan at P. iii. Even Mr. Eaton

testified that the plan is conceptual.

RCW 36.94.010(3)(a) underscores the conceptual nature of the sewerage general plans with this description:

> A sewerage general plan shall include the general location and description of treatment and disposal facilities, ...and a general description of the collection system to serve those areas, and other facilities as may be required to provide a functional and implementable plan. (Emphasis supplied.)

In two separate sections, RCW 36.94.010(3) and 36.94.030, the statute states that the plan is to be incorporated as a subsection in the County's comprehensive plan. The Washington courts have consistently recognized that a comprehensive plan is merely a "...blue print that suggests various regulatory measures," Westhill Citizens v. King County Council, 29 Wn. App. 168, 172, 627 P.2d 1002 (1961)

> Strict adherence to a comprehensive plan has not been required...even a zoning ordinance which conflicts with a comprehensive plan is not necessarily void.

Westhill at 172, citing Barrie v. Kitsap County, 93 Wn. 2d 843, 613, P.2d 1148 (1980).

Furthermore, Washington case law has consistently held that interpretation of a comprehensive plan in the duty and prerogative of the local governing body:

> Considerable judicial deference is given to the construction of legislation by those charged with its enforcement.

Keller v. Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979). Interpretation of local comprehensive plans has never been left to state agencies such as DOE.

II

DOE DOES NOT HAVE THE POWER TO VETO

THE COUNTY'S APPROVAL OF APPELLANT'S SYSTEM

DOE has the power to review plans for sewerage systems under RCW 90.48.110. That statute clearly states the principle that must govern a disapproval of a plan system by the agency:

> No approval shall be given until the commission is satisfied that said plans and specifications and the methods of operation and maintenance submitted are adequate to protect the quality of the State's waters as provided for in this chapter. (Emphasis supplied.)

RCW 90.48.035 states that the rules promulgated by the agency must relate to:

> standards of quality for waters of the state...in order to maintain the highest possible standards of all water in the states in accordance with the public policy as declared in RCW 90.48.010.

Similarly RCW 90.48.180 specifically directs the agency to issue waste disposal permits "unless it finds that the disposal waste material as proposed in the application will pollute the waters of the state in violation of the public policy declared in RCW 90.48.010."

No statute gives DOE the right to veto a county determination concerning its own sewerage general plan adopted under RCW 36.94. This is especially so when the veto runs directly counter to the statutory policy of "insuring the purity of all waters of the state." RCW 90.48.010.

In other words, appellant could develop his property using septic tanks. This is certainly worst for the ground water than a sewerage

system where the effluent flows to a City of Tacoma treatment plant.

III

DOE DOES NOT HAVE THE POWER TO ISSUE REGULATIONS CONCERNING A PROPOSAL SUCH AS APPELLANT'S SYSTEM WHEN THOSE REGULATIONS DEFEAT THE INTENT OF ITS ENABLING STATUTE

A. Regulations issued by DOE cannot force the county to follow its interpretation of RCW 36.94 when those regulations essentially amend. RCW 90.48.

The regulations which DOE uses to implement its power to review sewer projects are found in WAC 173-240. Those regulations recognize that the County's general sewer plan is intended to be a comprehensive plan showing "general" locations of sewer line. WAC 173-240-020(7)(f).

WAC 173-240-030 covers the submission of plans of individual projects. Paragraph four of that section makes the following statement, particularly relevant to this proposal:

> If the local government entity has received department approval of a general sewer plan and standard design criteria, engineering reports and plans and specifications for sewer line extensions, including pump stations, need to be submitted for approval. In this case the entity need only provide a description of the project and written assurance that the extension is in conformance with the general sewer plan.

Therefore, Pierce County is expressly given the discretion to determine that a particular system fulfills the purpose of the genral plan.

When the County does submit plans of a system to DOE, the

applicable review standards are found in WAC 173-240-040. Those standards make no mention of any review process whereby the DOE will make its own determination as to whether a system conforms to a general sewer plan. Instead the standards incorporate technical engineering manuals.

The only published statement by DOE concerning conformance with the County's general sewer plan is in Criteria For Sewage Works Design, State of Wash. DOE, 1978-1980. On page five that manual states that:

> The report shall identify and be consistent with all applicable area wide project, drainage basin, service area, comprehensive, and metropolitan area plans.

This report is incorporated by reference into the standards in WAC 173-240-040.

The above-quoted statement appears to be the sole basis for DOE's present contention that it has the power to veto the County's determination. There is no basis in the statute, however, for this statement in the regulations.

Washington has long recognized certain principles governing the permitted scope of agency regulations.

> It is settled that an administrative agency has only those powers which are expressly granted to it by statute, or necessarily implied in the grant. While such an agency has some discretion in interpreting ambiguous statutes, it may not alter or amend an act, and its interpretation must be within the framework and policy of the statute.

Burlington Northern v. Johnston, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977), Kaiser Aluminum v. DOE, 32 Wn. App. 399, 404, 647 P.2d 551

(1982).

The powers granted to DOE are controlled by RCW 90.48. The proper interpretatino of this, or any, statute must "give effect to the intent and purpose of the legislature.", Burlington Northern v. Johnston, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977). The clearly stated purpose of the legislature in RCW 90.48.010 is to "insure the purity of all waters of the state." Such a clear mandate cannot be properly extended to allow the DOE to veto a proposed system which is by statute under county control and which will clearly improve the water quality rather than harm it.

IV

DOE'S DECISION IS INCONSISTENT

WITH ITS PRIOR DECISION

The only statutory connection between DOE and the County's general sewer plan is an RCW 36.94.100, which states that the general plan itself must be reviewed by the agency. There is authority that an agency's interpretation of a statute which concerns it should be given weight, Kaiser Aluminum v. DOE, 32 Wn. App. 399, 404, 647 P.2d 551 (1982). However, no authority allows the DOE to veto a county interpretation of an approved general plan when the veto is completely inconsistent with the Department's prior practices.

DOE's disapproval of appellant's proposed system is inconsistent with prior departmental practice. In a letter dated February 5, 1979, DOE aprpoved a similar east-west running pump system in the Waller Road area to serve the Waller Road School. That system also crossed

planned locations of proposed north-south running sewer lines. In a letter dated September 12, 1977, DOE approved a system for"Stonewood" and "Twin Hills," two developments in the Chambers Creek area, which not only ran a different direction to the main lines shown on the general plan but even terminated in a totally different basin. Therefore, the "Stonewood" system was a more radical departure from the plan that that represented by appellant's system.

V

CONCLUSION

One must balance the citizen's right to comment on public policy questions with the right of the property owner to develop his land.

It seems to me that DOE has made, in essence, a land use decision in Pierce County. The majority is ratifying that decision. I can find no provisions in the law that give DOE the power to control county zoning. Yet, in reality, that is the result of affirming DOE's decision.

I believe the citizens should have been given the opportunity to comment on this developer's extension agreement. Howerver affirming DOE"s decision and forcing the property owner to persuade Pierce County to amend the sewer plan is punishing the wrong party. It is not the appellant that prevented the citizens from commenting on this contract, it is the county's responsiblity to achieve that kind of citizen participation.

In any event, it is our job to interpret and apply the statutes in a manner that furthers justice. I believe the greater justice is accomplished by finding for the appellant.

Therefore, I would vacate the decision of DOE and approve the proposed sewer system.

5/7/85

LAWRENCE J. FAULK, Chairman